

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





75-7437

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
No. 75-7437

----- x

SHIRLEY HERRIOT BROOKS, GLORIA JONES,  
individually and on behalf of all  
others similarly situated,

Plaintiffs-Appellants,

vs.

FLAGG BROTHERS, INC., individually and  
as representative of a class of all others  
similarly situated, HENRY FLAGG, individually  
and as President of Flagg Brothers, Inc.,  
THE AMERICAN WAREHOUSEMEN'S ASSOCIATION,  
THE INTERNATIONAL ASSOCIATION OF REFRIGERATED  
WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION  
OF NEW YORK AND NEW JERSEY, INC., THE COLD  
STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE  
PORT OF NEW YORK, and LOUIS J. LEFKOWITZ,  
As Attorney General of the State of New York,

Defendants-Appellees.

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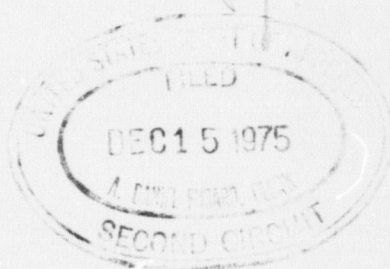
ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE AMERICAN WAREHOUSEMEN'S  
ASSOCIATION AND THE INTERNATIONAL  
ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.

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PRELIMINARY STATEMENT

Rather than burden the record with a repetition of  
the Questions Presented and Statement of the Case, AWA and IARW\*

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\* "AWA" refers to American Warehousemen's Association and "IARW"  
refers to The International Association Of Refrigerated Warehouses,  
Inc.



accept for their purposes those contained in the Brief of Plaintiffs-Appellants. Additional information concerning the position of warehousemen who are members of AWA and IARW is, however, necessary to a full understanding of the issues.

The Members of AWA and IARW operate public merchandise warehouses throughout the United States, including the state of New York. Merchandise warehouses provide storage and distribution services for industrial and commercial accounts.

AWA's 47 members, 18 of which are located in the State of New York, account for approximately 1,800,000,000 cubic feet of warehouse space which represents about 75% of all public merchandise warehouse space in the United States. (A. 161).\* IARW's 218 U.S. member companies, 27 of which are in New York State, account for about 567,000,000, cubic feet of public refrigerated warehouse space, or over 75% of the total in the United States. (A. 168-169).

AWA members typically store dry merchandise while IARW members provide refrigerated storage. The types of commodities handled range from consumer goods such as drugs, toiletries, foodstuffs, appliances, clothing, etc., to the storage of manufacturer's parts, machinery, chemicals, etc.

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\* References to the Appendix are denominated as "A".

The typical refrigerated warehouse stores perishable food-stuffs but is also handling an increasing variety of commercial products which require refrigeration, such as chemicals and plastics. (A. 162-163 and 169).

Both the merchandise and refrigerated warehouses are essential parts of the nationwide distribution system of many companies. They receive goods from producers throughout the country and distribute such goods throughout the surrounding regional territory.

The services accorded to such goods include break-bulk, consolidation, distribution of pool cars, cartage, packaging, repairing, coopering, sampling, weighing, loading and unloading of rail cars, and numerous other functions related to the storage and distribution of commercial goods. The refrigerated warehouseman provides freezing services as well as storage at a range of temperatures depending upon the nature of the product. (A. 164 and 169).

The merchandise warehouseman is typically a small, locally owned and managed company. Of the 1,677 general merchandise warehouses in the United States only 27 had 100 or more employees; only 200 had annual gross revenues of \$500,000 or more; and 954 of them were located in areas with



less than one million population. (A. 164). Of the 749 refrigerated warehouses in the United States, only 142 had annual gross revenues of over \$500,000; and only 182 were located in areas of 1,000,000 or more inhabitants. Of the 89 refrigerated warehouses in New York State, 22 were in New York City, 6 in Buffalo and the remaining 61 were in the smaller communities of New York. (A. 170).

These small, locally owned merchandise warehouses deal with large multistate and multinational corporations. They also deal with small, unknown companies located throughout the country and the world.\*

Merchandise warehouses perform a vital commercial function in facilitating the movement of goods in the stream of commerce. Goods from all over the country, as well as imported goods, are consigned to a local warehouse. The warehouse receives the goods,

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\* The position of the warehouseman is indicated in a 1970 study described in Ackerman, Gardner & Thomas, Understanding Today's Distribution Center, pages 5-6 (1972), stating:

"The average company in this industry (public warehousing industry) had annual revenue of \$235,000 and a total storage space of approximately 100,000 square feet. Of the many manufacturers using public warehousing, 75 per cent were companies which distribute their products nationally.

The public warehousing industry is dominated by local companies. Over 80 per cent of the public warehouse companies in existence do business in only one city. Of those multicounty companies which do exist, no single organization has a significant national market share".

performs the various break bulk and other commercial services with respect to the goods, and distributes them in customized orders to the various customers of the bailor. Its function is to facilitate the flow of goods from producer to user. Distribution costs are reduced and operating efficiencies are attained. (A. 162, 164 and 169).\*

In providing these vital commercial services the local warehouseman relies upon the existence of the warehouseman's lien. It permits him to assume the risk of receiving goods; storing the goods; performing the necessary

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\* The Interstate Commerce Commission described the functions of merchandise warehouses in Gallagher v. Pennsylvania R. Co., 160 I.C.C. 563, 564-565 (1929) as follows:

"...public warehouses are customarily used for the receipt, storage, and distribution of merchandise. That these warehouses perform an important public service is undisputed. The merchandise warehouse receives goods in carloads and distributes them in smaller quantities to local jobbers or retailers, or reships them in less-than-carload lots to near-by destinations; issues negotiable and nonnegotiable receipts, provides insurance, and allows credit to be obtained on merchandise stored; provides recooling, marking, and separation of varieties and various incidental clerical services. Warehouse services enable manufacturers to keep spot stocks for their customers; equalize production by steadily absorbing the manufacturers' output while eliminating heavy investment in reserve storage space; reduce freight charges and save time in transit through handling goods in carload quantities; reduce fire risk and loss and damage claims; and eliminate the necessity of providing storage space at point of origin".



break-bulk, packaging and related functions; and shipping the goods. Often he will pay the incoming and outgoing freight charges to facilitate the movement of the goods.

All of these services and expenditures are done in reliance upon the lien. The lien applies to all goods of the bailor in possession of the warehouseman, allowing the release of goods but retaining the security of the lien upon other goods of this bailor in storage.

The existence of the lien allows the free flow of goods through the warehouse without the necessity of prepayment procedures or similar strictures which would preclude the movement of goods until charges have been satisfied. The lien allows the local, generally small warehouseman to deal in the goods of companies located throughout the country and the world without extensive prearrangement for security, credit, prepayment and similar protections. The lien facilitates the movement of goods through the stream of Commerce.

Small companies and new companies must minimize their outlay of capital in the distribution and marketing of their goods. At the same time they must expand and open up new markets and sell into new parts of the country. The

existence of the security of the lien facilitates the warehouseman's handling of the goods of such companies without the prepayment of all contemplated charges. (A. 165-166, 170-171).

The sale of goods pursuant to the lien is also a commercial necessity. Space is the foundation of the warehouseman's operation. The space occupied by goods of a defaulting bailee must be expeditiously cleared. It is of little benefit to the warehouseman to assert that if delays occur because of the need to sue on the debt and foreclose on a judgment that the additional storage charges during the delay might be part of the compensation.

The merchandise warehouse is designed to move goods and earn revenues in handling goods and providing the various break-bulk, packaging and related functions. The opportunities to earn such revenues are lost when space is tied up in the non-productive storage of a defaultee's goods.

Other potential users are precluded from use of the space. In peak periods of warehouse use, this would be detrimental to commerce generally.



Further, the value of commercial goods often requires that they be expeditiously sold. Perishable goods are a prime example. If not quickly sold their value is diminished or even lost. Seasonal goods are another example, as are commodities with widely fluctuating market prices. (A. 165-166, 171-172).

The sale provisions of the Code allow a commercially-reasonable process for disposition of the goods. In the circumstances of modern commercial practice, national and international markets, and the recognition of the position of the persons dealing in the warehousing of commercial merchandise, the provisions for the lien and the sale of goods are reasonable and appropriate.

This Court should recognize the substantial differences which exist with respect to the plaintiffs' situation in the storage of their used household goods and that of the merchandise warehousing industry. The household goods warehouse receives a person's household effects, stores them and releases them when the charges are paid. The merchandise warehouseman does not and cannot deal economically with each lot of goods as a separate, distinct unit. It must allow goods to flow through the warehouse, often shipping the goods within hours or days of their arrival. The lien as is permits the goods to be so handled, and it is a commercial necessity for the merchandise warehouse industry. (A. 171).

POINT I

NO STATE ACTION IS INVOLVED IN  
THE CREATION OR EXECUTION OF THE LIEN

The Court below held that there is no action by the state involved in either the creation of the warehousemen's lien or the sale of goods pursuant to that lien. Plaintiffs have apparently abandoned their argument that the enactment of Section 7-209 allowing for the creation of the lien is state action. They recognize that the lien existed prior to the codification and its enactment does not constitute action in derogation of the common law or a public function performed by a private party (Plaintiffs' Brief pages 15-16, 19, 23, 34 and 51).

As to Section 210, the lien execution provisions, the Court below was correct in concluding that state action was not involved.

The doctrine of state action requires not merely state involvement; otherwise all private action falling under any statute as well as all common law adopted by statute in the various states would constitute state action. The requirement is one of significant state involvement. Moose Lodge v. Irvis, 407 U.S. 163, 173 (1972).



The question of whether state involvement was sufficiently significant was discussed in Adams v. Southern California First National Bank, 492 F. 2d. 324 (9th Cir.-1973). The Court there found no significant state action in the repossession provisions of the Uniform Commercial Code Section 9-503 and 9-504.

Similarly, in Oller v. Bank of America, 342 F. Supp. 21, 23 (N.D. Cal.-1972), the Court noted:

"It is difficult to imagine any statutory provision that does not, in some way, control human relationships. To say, as plaintiff seems to contend, that all human behavior which conforms to statutory requirements is 'state action' or is 'under color of state law' would far exceed not only what the framers of the Civil Rights Act ever intended but common sense as well".

Plaintiff's reliance on Hernandez v. European Auto Collision, Inc., 487 F. 2d. 378 (2d. Cir.-1973), is misplaced. In that case the lower Court had specifically concluded that it need not pass upon the question of state action since the complaint was dismissed on other grounds. The Appeals Court reversed the dismissal and remanded for a trial without any decision as to whether state action was involved.

Judge Werher's Opinion recognized that Hernandez could not be considered dispositive of the state action question.

(A. 210). His conclusion is proper. To build so substantial an argument as state action upon the slender need of an implicit finding would be incorrect.

Instead, Judge Werher correctly applied the factors enumerated in Jackson v. Statler Foundation, 496 F. 2d. 623 (2d. Cir.-1974), cert. denied, 420 U.S. 927 (1975), to determine if state action was involved in Section 210. All of this leads to the conclusion that significant state involvement does not exist with respect to the lien enforcement provision.

This conclusion was adopted in Melara v. Kennedy, 74 Civ. 1535 (N.D. Cal. 1974), where the California equivalent of Section 210 was specifically held not to involve significant state action. To the same effect is Smith v. Bekins Moving & Storage Co., 384 F. Supp. 1261 (E.D. Pa. 1974).

Finally, in Magro v. Lentini Bros. Moving and Storage Co., 338 F. Supp. 464, 466 (E.D.N.Y.-1971), the Court refused to reach the issue of whether state action was involved, deciding that the warehousemen's lien provisions did not violate due process requirements.

The cases addressing themselves to the warehouseman lien statute all support Judge Werher's Opinion. This conclusion



is sound, conforms with the decisions and should be applied in the instant proceeding. Neither the creation of the warehousemen's lien nor its execution involve significant state action under Section 1983.

## POINT II

### IN THE MERCHANT-WAREHOUSEMAN SITUATION THE STATUTE SATISFIES DUE PROCESS

Recent decisions establishing due process criteria applicable to the protection of consumer property clearly recognize distinctions among the types of property and the persons involved. Those distinctions must be applied to any analysis of whether Section 210 satisfies due process. In the commercial setting of merchandise warehousing, Section 210 satisfies due process requirements.

The case of Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) involved wage earners and the garnishment of wages without any prior hearing. The Court recognized the unique position of both the type of persons involved in garnishment proceedings and the special status of the type of property involved in a wage garnishment.

As the Court stated in Sniadach, supra, at page 340:

"We deal here with wages - a specialized type of property presenting distinct problems in our economic system."

The Court then discussed various studies which had been conducted with regard to the effects of garnishment. These studies indicated that garnishment falls heavily upon the poor and forces the wage earner's income to fall below the poverty level. With respect to the parties involved in garnishment actions the Court recognized:

"The leverage of the creditor on the wage earner is enormous". Sniadach, supra, at page 341.

Both the type of property involved and the circumstances of the persons affected are important to the determination of what procedures are required.

In Fuentes v. Shevin, 407 U.S. 67 (1972), the Court elaborated upon its holding in Sniadach, supra. Conditional sales contracts covering household furnishings were involved. In ruling that a prejudgment seizure of such goods without any prior hearing violated due process, the Court specifically pointed out that Sniadach was not intended to be limited to wages or other necessities.

However, the Court specifically considered the position of its hearing requirement in a commercial context and concluded that its holding was not intended to extend that far. It cited D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972), to illustrate



the proposition that the hearing requirement was not an absolute rule but depended upon the circumstances involved in the particular transaction. In Overmyer, supra, the Court concluded that a cognovit clause is not, per se, violative of due process.

"The facts of this case . . . are important, and those facts amply demonstrate that a cognovit provision may well serve a proper and useful purpose in the commercial world and at the same time not be vulnerable to constitutional attack". 405 U.S. 174, at pages 187-188.

The Court further notes that facts such as the relative bargaining power of the parties, whether the contract is one of adhesion, the benefit received by the debtor, and the defenses which can be asserted by the debtor are salient factors to be considered in the due process equation.

In Mitchell v. Grant, 416 U.S. 600, (1974), the Court again specified that the Fuentes holding was not an absolute rule. There must be a balancing of the interests of the parties involved. "Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well". Mitchell v. Grant, supra, at page 604.

Not only is a balancing of interests required, but the Court also recognized that the type of property involved and

the entire circumstances surrounding the transaction are important to a determination of whether due process requires a hearing.

The lower Court decisions relied upon by the plaintiffs also recognize that the necessity for a hearing depends upon the type of goods, parties involved, and the circumstances of the transaction.

In Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. - 1970), the innkeeper's lien provision was held to violate due process. The Court noted that the lien applies to the economically oppressed whose sole possessions, meagre as they may be, are taken by the innkeeper. The person normally affected is the long-term boarder whose clothes, tools, documents and other necessary goods are seized by the innkeeper, and the seizure creates economic leverage that furthers the oppression of the disadvantaged.

To the same effect was Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972), where the Court noted that the innkeeper's lien applied to necessities and that the deprivation of these items imposed a great hardship upon the individual. In Blye v. Globe - Wernicke Realty Co., 33 N.Y., 2d. 15, 21 (1973), the Court struck down statutory provisions allowing the innkeeper to take a guest's property saying:



"...the statute falls hardest on people such as this plaintiff who work in the community and make their residence at a hotel or other like establishment. With respect to this class of persons, at least, the extraordinary remedy of summary seizure is especially harsh, oppressive, and, it would seem, unnecessary."

It is abundantly clear that the due-process requirement is formulated in terms of the parties involved, the nature of the property and the circumstances surrounding the transaction.

Applying the standards developed in these recent decisions to the warehouseman's lien when commercial and industrial products are involved, it is obvious that the lien should be upheld. The parties storing goods in merchandise warehouses are business corporations and merchants. They are knowledgeable concerning commercial practices and deal with the merchandise warehousemen from an arms-length position. The contract is not one of adhesion, and the merchant is, at least, the equal of the warehouseman. Often the bailor in such circumstances is a nationwide company with far greater resources than the warehouseman's.

The goods so stored are those raw materials and finished products dealt with by the merchant in the course of its business. They are not personal items of property used by individuals. The products are moving in the stream of commerce. The creation

of the lien or its execution under the statute does not deprive an individual of any necessities or similar specialized property that has been accorded due process protection.

Without arguing whether the "driven-to-the-wall" criterion remains valid, the enforcement of the lien in the commercial setting clearly does not violate that concept.

The rationale developed by the Courts to provide due process protection for consumers just does not apply to the warehouseman's lien in the operation of merchandise warehouses. The Court should specifically so hold.

Other Courts have distinguished between the commercial situation and the consumer cases. In American Oil Company v. McMullin, 433 F. 2d. 1091 (10th - Cir. 1970), the plaintiff sought damages for money advanced to and property wrongfully converted by defendant in his lease and operation of a service station and cafe. The Court rejected defendant's argument that a garnishment and attachment of his property were precluded by Sniadach, supra, stating:

"We do not think that Sniadach was intended to preclude all attachments and garnishments merely because some hardship may result".  
433 F. 2d. at page 1096.



In Brunswick Corporation v. J. & P., Inc., 424 F. 2d. 100, 105 (10th Cir.-1970), bowling equipment sold under a conditional sales agreement was replevied and sold, after notice to the purchaser but before any hearing, and prior to any judgment in the replevin action. The Court refused to find the taking and sale unconstitutional on the basis of Sniadach, supra, recognizing the distinction between the property and interests involved.

In Swarb v. Lennox, 405 U.S. 191 (1972), a companion case to Overmyer, supra, involving Pennsylvania's cognovit provisions, the Court specifically refused to rule that the statute was unconstitutional on its face. The circumstances surrounding the execution of the cognovit must be examined to determine whether the debtor effectively waived rights he would otherwise have possessed if there had been no cognovit provision.

The Court should specially find that the involved statute is not unconstitutional on its face and that the enforcement of the lien against a merchant warehousing goods stored in the course of its business is constitutional, recognizing the nature of the parties, the type of goods involved and the circumstances surrounding the transaction.

Not only is such a conclusion consonant with due process precepts, but it also recognizes the commercial importance of the warehouseman's lien. The lien plays an important part in facilitating the free flow of commerce. Merchandise is stored, transportation charges advanced, and work done to the goods on the basis of the possessory lien. The credit risk of an individual warehouseman dealing with corporations located throughout the world is minimized by the lien. Absent the lien, prepayment procedures, and other restrictive policies would be required, all of which would merely raise the ultimate cost of consumer goods.

The lien, existing along with a carrier's lien since the early days of the common law, does not violate due process and neither do the enforcement provisions.

The products stored by merchandise warehouses are not the type of property that requires the specialized protection of a judicial hearing prior to sale. They are goods stored by merchants in the course of their business.

The decisions have not treated such goods as the type of specialized property that requires a hearing prior to sale. They have, instead, recognized a distinction as to such commercial property in the procedures which will satisfy due process.



When businessmen are dealing with each other under long recognized commercial practices, the requirements of due process need not warrant the careful protection circumscribing the dealings between a businessman and an uninformed consumer who has no bargaining power and little familiarity with legal procedures.

The sale provisions have existed for many years. The provisions now have nation-wide applicability, having been adopted in all of the States except Louisiana. They exist as a uniform standard for businessmen warehousing their goods throughout the United States. Such uniformity is important in as much as most goods warehoused in merchandise warehouses are those distributed nationally.

The statute itself recognizes a distinction between the sale of goods warehoused by a merchant in the course of his business and the sale of "goods other than goods stored by a merchant in the course of his business". Paragraph (1) of Section 7-210 applies only to the merchant's goods. All persons known to claim an interest in the goods must be notified of the sale. The warehouseman is required to sell the goods on commercially reasonable terms; in a recognized market or at a price current in such market, or in conformity with commercially-reasonable practices among dealers in the type of goods sold.\*

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\* The statute in Paragraph (8) allows goods of a merchant stored in the course of business to be sold under the public auction provisions of paragraph (2), a practice which would be appropriate if there is no recognized market.

Among businessmen such requirements satisfy due process. The goods sold are those that are stored for the purpose of sale in the course of business. The statute permits their sale in the course of business, requiring conformity in the sale to commercially-reasonable practices. Due process should require no more.

If there is a dispute over the storage charges, it can be subsequently litigated. In the meantime the goods are sold which satisfies the purpose of their having been stored, and the warehouseman is able to use the space vacated. It must be recognized that merchandise warehousing is the business of using space for the expeditious and frequent movement of goods.

If the businessman does not want the goods sold, he can pay the charges and sue if there is a dispute over the amount. In commercial practice such a requirement does not violate due process, but is a reasonable accommodation among competing interests. It is not so oppressive, recognizing the type of goods and the parties involved, as to require a judicial hearing prior to sale.

The statute embodies legitimate commercial objectives, provides reasonable protection of the competing interests in light of the property and persons involved, and should not be found to violate due process. Neither on its face nor in its implementation in the commercial setting is more required by due process than that which is set forth in the statute.



POINT III

CLASS ACTION STATUS  
SHOULD NOT BE ACCORDED

To include merchandise warehousemen in the same class as household goods warehouses for purposes of Rule 23 is inappropriate. The two groups are separate and distinct in terms of the type of goods handled, the functions performed and the operations conducted.

Similarly, the individual storing his household goods is wholly dissimilar from the General Election Company storing its finished goods prior to distribution to wholesalers and retailers.

Plaintiffs recognize the distinction which exists between the different types of warehousemen. At page 45 of their Brief the plaintiffs agree to limit the defendant class to include only consumer transactions where there is no contractual authorization for the sale of the goods.

If the class can be so drawn and the definition further refined to include only those who store used household goods for individuals, and the Court would specifically find that the statute, as written, satisfies due process requirements for the storage of commercial goods, the interests of AWA and IARW would be satisfied.

The various warehousemen have a common interest in upholding the constitutionality of the statute. As previously indicated, however, a valid due-process distinction exists between the protection accorded consumers and the status of transactions among businessmen. Such distinctions preclude a valid designation of so sweeping a class as all warehousemen and all bailors of all types of goods.

Further, there is no necessity for a class action designation. The plaintiffs' claims of constitutional deprivation, in their particular circumstances, should be appropriately determined in their individual suits. A determination of unconstitutionality under such facts would adequately resolve the constitutional claim in similar circumstances. Bond v. Dentzer, 325 F. Supp. 1343 (N.D.N.Y. - 1971).




CONCLUSION

Plaintiffs' Appeal should be denied. This Court should affirm the lower Court's Opinion. If, however, it finds federal jurisdiction it should specifically hold that the warehouseman's lien provisions of Sections 7-209 and 7-210 do not violate due process in the circumstances of a merchant's storage of property used in the course of its business.

Respectfully submitted,

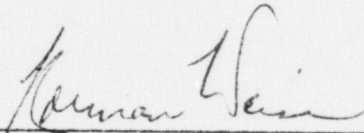
AMERICAN WAREHOUSEMAN'S ASSOCIATION and  
THE INTERNATIONAL ASSOCIATION OF  
REFRIGERATED WAREHOUSES, INC.

By:



WILLIAM H. TOWLE  
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By:



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DATED: December 12, 1975

STATE OF NEW YORK, COUNTY OF

VELMA O'LOUGHLIN

being duly sworn, deposes and says: deponent is not a party to the action.

is over 18 years of age and resides at Bronx, N.Y.



Affidavit  
of Service  
By Mail

On December 15, 19 75 deponent served the within Appellees' brief

upon the parties listed below\*

attorney(s) for the parties in this action, at

respective names\*, which are the addresses set forth beneath their  
the address designated by said attorney(s) for that purpose  
by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office  
depository under the exclusive care and custody of the United States Postal Service within the State of New York.



Affidavit  
of Personal  
Service

On 19 at  
deponent served the within upon

herein, by delivering a true copy thereof to h personally. Deponent knew the  
person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on December 15th

Notary Public, State of New York  
No. 314444

The name signed must be printed beneath

\* Martin A. Schwartz, Esq.

The Legal Aid Society of Westchester County

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Commission Expires March 15, 1977

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